

**IN THE MATTER OF A COMPLAINT PURSUANT TO
THE CANADIAN INTERNET REGISTRATION AUTHORITY
DOMAIN NAME DISPUTE RESOLUTION POLICY**

Dispute Number: DCA-2146-CIRA
Domain Name: <sunrisehatchery.ca>
Complainant: Sunrise Poultry Processors Ltd.
Registrant: Sunrise Hatchery Inc.
Registrar: Webnames.ca Inc.
Panel: The Honourable Neil Anthony Brown QC, (Chair), Thomas
Manson, QC, and W.A. Derry Millar, Panelists
Service Provider: British Columbia International Commercial Arbitration Centre

DECISION

I - INTRODUCTION

A. OVERVIEW

1. This matter concerns a dispute between the Complainant and the Registrant regarding the registration of the domain name <sunrisehatchery.ca> (“the disputed domain name”).
2. The British Columbia International Commercial Arbitration Centre (“BCICAC”) is a recognized service provider to the CIRA Domain Name Dispute Resolution Policy (“the Policy”) of the Canadian Internet Registration Authority (“CIRA”).
3. This is a proceeding under the CIRA Domain Name Dispute Resolution Policy (“the Policy”), in accordance with the CIRA Dispute Resolution Rules (“the Rules”). The Complainant claims that the Registrant registered the disputed domain name in breach of the Policy. It asks for an order that the disputed domain name be transferred from the Registrant to the Complainant. The Registrant has filed a Response in this proceeding in which it denies it is in breach of the Policy, asks that the domain name remain registered with it and that an order be made that the Complainant contribute \$5000 towards the Registrant’s costs of the proceeding. In an additional submission, the Complainant asks for an order that the Registrant contribute \$5000 towards the Complainant’s costs of the proceeding. However, even a cursory reading of the Policy shows that there is no such power to award costs to a Complainant.

B. THE PARTIES

4. The Complainant in this proceeding is Sunrise Poultry Processors Ltd, c/o Miller Thomson LLP, 400-725 Granville Street, Vancouver, BC V7Y 1G5, Canada (“the Complainant”).
5. The Registrant in this proceeding is Sunrise Hatchery Inc. 9420-109 Street, Westlock, AB T7P 2R4 (“the Registrant”).

C. REGISTRATION OF THE DISPUTED DOMAIN NAME

6. The disputed domain name <sunrisehatchery.ca> was registered by the Registrant on November 20, 2007.
7. The Registrar of the disputed domain name is Webnames.ca Inc.

D. PROCEDURAL HISTORY

According to the information provided by the BCICAC:

- (a) The Complainant filed a Complaint with respect to the disputed domain name in accordance with the Policy on October 3, 2019 via electronic transmission.
- (b) The Complaint was reviewed and found to be administratively compliant. By letter dated October 7, 2019 and delivered via email, the BCICAC as service provider confirmed administrative compliance of the Complaint and commencement of the dispute resolution process and as Notice in accordance with Rules 2.1 and 4.3, forwarded a copy of the Complaint to the Registrant together with its Schedules, by email on that date, as the Complaint with attachments had been filed exclusively by email. By the same communication the BCICAC informed the parties that in accordance with Rule 4.4 the date of commencement of the Proceeding was October 7, 2019 and that any Response had to be filed by October 28, 2019. The said communication was successfully delivered.
- (c) The Registrant delivered its Response, in compliance with the Policy and the Rules, to the Centre on October 28, 2019.
- (d) The Complaint and the Response were filed in English, which shall be the language of the proceeding.
- (e) In accordance with paragraph 6 of the Rules, the BCICAC as Provider is required to appoint a three-person Panel, with consideration to the nominees of the parties, and select a Chair. Accordingly, on October 31, 2019, the BCICAC appointed Thomas Manson, QC, and W.A. Derry Millar as panelists and The Honourable Neil Anthony Brown QC as Chair of the Panel. Each of the panelists has signed and forwarded to the BCICAC an Acceptance of Appointment as Arbitrator and Statement of Independence and Impartiality.
- (f) Absent exceptional circumstances, the time period for delivery of the decision was 21 days, namely by November 21, 2019. However, on November 20, 2019 the Panel determined that due to exceptional circumstances, the time period for the delivery of the decision would be December 6, 2019 and the BCICAC communicated that decision to the parties.
- (g) The Panel has reviewed all of the material submitted by the Complainant and is satisfied that the Complainant is an eligible Complainant under the Policy and the Rules pursuant to section 2(d) of the Canadian Presence Requirements for Registrants, by virtue of the fact that the Complainant is a corporation incorporated in British Columbia, Canada and that it therefore meets the Canadian Presence Requirement under paragraph 2(d) of the CIRA Canadian Presence Requirements for Registrants Policy, Version 1.3.

II - FACTUAL BACKGROUND

The facts set out below are taken from the Complaint and the Response, together with related Schedules.

The Complainant and the Respondent are Canadian companies engaged in various aspects of the chicken and poultry industries and have done so for some years. As their precise history and aspects of their business activities are the subject of debate in this proceeding, the Panel will not make any final determinations on those matters at this stage but will do so later in this decision when the evidence is under discussion.

However, the parties are in dispute over the registration by the Registrant of the disputed domain name. The Complainant says that the registration is in breach of the Policy and the Registrant says that it is not.

Accordingly, the Complainant has instituted this proceeding and requested that the disputed domain name be transferred from the Registrant to the Complainant.

The Registrant has requested that it be able to keep the registration of the disputed domain name.

CHRONOLOGY

In the course of the submissions a number of allegations have been made about the timing of various occurrences. The Panel felt that it might be of assistance to readers to have a chronology. This is not, of course, evidence but may help to guide readers through this history. Trademarks (™) are referred to in capital letters.

Alleged Event	Date
Complainant incorporates "Sunrise Poultry Processors Ltd."	Nov. 19, 1982
Complainant in poultry and using "Sunrise Trademarks" in connection with its operations	1983 and after
Complainant has registered various ™s since	1987
SUNRISE POULTRY™	1987
SELECT SERVINGS™	1992
Registrant incorporates "Sunrise Hatchery Inc."	Feb. 6, 2004
Agreement that Complainant would use the name "Lethbridge Hatchery"	2004
"Sunrise" used by Registrant since it began operations	2004
"Sunrise Farms" and "Sunrise Farms Select Servings" used by Complainant as early as	May 2005

SUNRISE FARMS SELECT SERVINGS™ and SUNRISE FARMS™ registered	Aug. 3, 2007
Registrant registers Disputed Domain Name	Nov. 20, 2007
“Sunrise Hatchery” used by Registrant	Various Dates
“Sunrise Hatcheries” used by Complainant as early as	Oct. 2016
SUNRISE HATCHERIES™ registered	Aug. 21, 2018

III - POSITION OF COMPLAINANT

8. The Complainant submits as follows:

A. CANADIAN PRESENCE REQUIREMENTS

9. The Complainant submits that it satisfies the Canadian presence requirements of paragraph 1.4 the Policy in view of the fact that the Complainant is a corporation incorporated in British Columbia, Canada and that it therefore meets the Canadian Presence Requirement under paragraph 2(d) of the CIRA Canadian Presence Requirements for Registrants Policy, Version 1.3.

B. THE REGISTRATION OF THE DISPUTED DOMAIN NAME

10. The disputed domain name <sunrisehatchery.ca> was registered by the Registrant on November 20, 2007. In support thereof, the Complainant adduces a copy of the WHOIS information for the domain name.

11. The Registrar of the Disputed Domain Name is Webnames.ca Inc. and the Complainant has adduced evidence to that effect.

C. THE COMPLAINANT'S RELEVANT TRADEMARK RIGHTS AND ITS USE BY THE COMPLAINANT IN ITS BUSINESS

12. The marks relied on by the Complainant are the trademarks for

- (a) SUNRISE POULTRY, Registration No. TMA 323,193 registered with the Canadian Intellectual Property Office on January 30, 1987;
- (b) SELECT SERVINGS, Registration No. TMA 405, 550 registered with the Canadian Intellectual Property Office on November 27, 1992;
- (c) SUNRISE FARMS, Registration No. TMA 661,473 registered with the Canadian Intellectual Property Office on March 24, 2006;
- (d) SUNRISE FARMS SELECT SERVINGS, Registration No. TMA 693,473 registered with the Canadian Intellectual Property Office on August 3, 2007;
- (e) SUNRISE FARMS Registration No. TMA 693,474 registered with the Canadian Intellectual Property Office on August 3, 2007; and

- (f) SUNRISE HATCHERIES, Registration No. TMA 1003295 registered with the Canadian Intellectual Property Office on August 21, 2018;

and all used by or on behalf of the Complainant in Canada since 1983, the Complainant being well-known in the Canadian chicken industry. The Complainant has enjoyed its rights to the trademarks in Canada. A copy of the trademark certificates relating to those trademarks is adduced by the Complainant in evidence. The trademarks are hereinafter referred to as “the SUNRISE trademarks”.

13. The Complainant has a long-standing and well-developed reputation based on the use of the trademarks in Canada.

D. THE GROUNDS ON WHICH THE COMPLAINT IS MADE

(a) Confusingly Similar

14. **Complainant's Marks.** The Disputed Domain Name is confusingly similar to the SUNRISE trademarks, each of which is a mark within the meaning of subsection 3.2(a) and (c) of the Policy and in which Complainant had rights prior to the date of registration of the Domain Name and in which it continues to have rights.
15. The Disputed Domain Name is confusingly similar to the SUNRISE trademarks because it contains the entirety of the trademarks in the domain name and the mandatory .ca extension, which it is well established is not taken into account for these purposes. Within the meaning of section 3.3 of the Policy, the domain name so clearly resembles the mark in appearance sound, or the ideas suggested by the mark as to be likely to be mistaken for it.
16. The SUNRISE trademarks are known to identify the Complainant and its goods and services. Internet users would therefore naturally assume that the domain name refers to the Complainant and its products and a customer could be easily misled by the confusing similarity which would also have an impact on the commercial relationship sought by the complainant with its customers.
17. Applying the test set out in the Policy and the principles elaborated upon in CIRA decisions, the disputed domain name is confusingly similar to the SUNRISE trademarks. Actual confusion has also occurred.
18. Moreover, where a disputed domain name includes the Complainant's mark and additional descriptive words or letters, this will not prevent the domain name from being found to be confusingly similar, which is so found in the present case.

(b) No Legitimate Interest

19. It is submitted that the Registrant does not have any legitimate interest in the disputed domain name within the meaning of section 3.4 of the Policy.
20. There are six non-exclusive circumstances under which the Registrant may establish a legitimate interest in a domain name, and the Complainant submits that the Registrant could not bring itself within the plain language of any of them.

21. The Complainant's argument is in effect that none of the six categories apply to the Registrant.
22. In particular it submits that there is no evidence that the Registrant has rights in the SUNRISE HATCHERIES trademark, no wares, services or business described in any way by that trademark, no generic name, no non-commercial activity, that the Registrant is a competitor of the Complainant and that the company Sunrise Hatchery Inc. is not used by the Registrant, as it exists primarily to sow confusion with the Complainant's legitimate business.
23. Even when listing Sunrise Hatchery as a business name the Registrant conducts business under the name Rochester Hatchery.
24. Finally, it is submitted that the SUNRISE HATCHERIES trademark is not a geographic location.

E. Bad Faith

25. The Complainant submits that the Registrant has registered the Domain Name in bad faith. The Policy lists four non-exhaustive circumstances that may establish bad faith registration. The Complainant relies on subparagraphs 3.5.3, and 3.5.4 and maintains that it can establish both of those provisions.
26. Thus:
 - (a) **Registered the domain name primarily for the purpose of disrupting the business of the Complainant, who is a competitor of the Registrant. (Subparagraph 3.5.3)**
27. The Complainant submits that the Registrant competes with the Complainant in the Canadian chicken industry. The Registrant acquired the domain name primarily for the purpose of disrupting the business of the Complainant and this is a ground for a finding of bad faith.
28. It did this by offering services competitive to those of the Complainant.
29. Moreover, the use of the domain name "could cause confusion and negatively impact public image impact about affiliation with the Complainant." (sic).
30. As a result, whenever there is a problem in the industry, this problem is associated with the Complainant, as is shown by the salmonella health issues of May 2015 and confusion is thus created in the industry.
31. Sunrise is a very well-known and trusted brand in the Canadian chicken industry and a purported association with the SUNRISE trademarks may increase site visits to the disputed domain name, decreasing site visits to the Complainant's site.
32. The Registrant is not known in the industry and does not operate the business under the "Sunrise Hatchery" name.
33. All contact information available at the domain name is that of "Rochester Hatchery."

34. Common sense, the evidence and all the circumstances, show that the Registrant had no legitimate purpose in choosing the domain name other than to disrupt the Complainant's business and disrupt internet traffic from the Complainant's website.
35. Thus, the Registrant is violating the SUNRISE trademarks and competing illegitimately with the Complainant.

(b) Intentionally Attempting to Attract for Financial Gain by Creating Likelihood of Confusion as to Source, Sponsorship, Affiliation or Endorsement (Paragraph 3.5.4)

36. The Complainant also relies on Paragraph 3.5.4 of the Policy to show bad faith registration. The Complainant submits that ground has also been made out on the evidence.

(c) The Complainant's conclusion on Bad Faith

37. The Complainant therefore submits that it has met its burden of proving that the Registrant registered the disputed domain name in bad faith under both subparagraphs 3.5.3 and 3.5.4 of the Policy.

(d) Conclusion on the Complainant's case as a whole

38. The Complainant submits that it has made out the three elements that it must establish and that the Panel should therefore order that the disputed domain name be transferred from the Registrant to the Complainant.

F. Applicable Law

The Complainant submits that the Complaint should be resolved in a manner consistent with the law of the Province of British Columbia and the federal laws of Canada.

In that regard, the Complainant refers to and relies on several CIRA authorities that are cited and said to be based on analogous circumstances.

IV - POSITION OF THE REGISTRANT

39. The Registrant submits as follows.
40. The Registrant, Sunrise Hatchery Inc., is one of three companies of the Keshwani family. It began operations in 2004, when the Complainant had no trade-marks registered.
41. There is no evidence of any other poultry business called "Sunrise" operating in Alberta when the Registrant began operations in 2004.
42. In 2004, the Complainant expressed a desire to diversify out of British Columbia and commence operations in Alberta. Because the Complainant and the Registrant might have been confused for each other, the Complainant and the Registrant agreed that the Complainant would use the name "Lethbridge Hatchery" in connection with its Alberta operations, which it did and continues to do.

43. This agreement is evidenced by the fact that the Complainant has held itself out as Lethbridge Hatchery for years. Moreover, Miller Thomson has represented and issued accounts to both the Registrant under the name "Sunrise Hatchery" and the Complainant under the name "Lethbridge Hatchery" in the past.
 44. The Complainant's submission that the Registrant "does not rely on this corporate name to conduct any legitimate business" is therefore entirely without foundation.
 45. Moreover, counsel for the Complainant knows this allegation against the Registrant to be inaccurate, and Counsel for the Complainant has acted for the Registrant previously.
 46. Thus, evidence to support this proposition is to be found in the several accounts that Miller Thomson has issued to the Registrant in the past.
 47. The overarching allegation of the Complainant that the Registrant does not rely on the name Sunrise Hatchery to conduct a legitimate business is simply false.
 48. The Registrant has ample evidence to establish this, including corporate tax returns under its corporate name, a federal government-issued permit to operate under the name "Sunrise Hatchery", sponsoring yearly advertisements for "Sunrise Hatchery" in poultry magazines, attending the Alberta Poultry Industry Conference, which the Registrant regularly sponsored under the name "Sunrise Hatchery," hosting its own annual convention to promote its business under the name "Sunrise Hatchery," sending customers promotional materials with the name "Sunrise Hatchery," and using the name "Sunrise Hatchery" on business cards.
 49. These documents show the Registrant is a legitimate, profitable business which has used its name in connection with its Alberta hatchery operations for the past fifteen years.
- A. THE LAW**
50. The Registrant submits that the Complainant cannot succeed on any of the three criteria under the CIRA Policy, namely:
 - (a) whether the domain name is confusingly similar to a trade-mark,
 - (b) whether the Registrant has a legitimate interest in the domain name, and
 - (c) whether the Registrant registered the domain name in bad faith.
 51. The essential differences between the disputed domain name and the Complainant's trademarks show that there cannot be any confusing similarity between them, each invoking as it does a different part of the chicken industry.
 52. In any event, the Complainant registered its "Sunrise Farms" trademark two years after the Registrant had been operating in the Alberta industry.
 53. Moreover, when the Complainant registered the trade-mark "Sunrise Hatcheries" in 2018, the Registrant had been operating under the name "Sunrise Hatchery" for 14 years in the Alberta industry.

B. LEGITIMATE INTEREST

54. The Registrant submits that it has a legitimate interest in its name because, within the meaning of paragraph 3.4.2, the Registrant registered its domain name "sunrisehatchery.ca" in Canada in good faith. The name is clearly descriptive in English of a hatchery which the Alberta industry associates with the character of the wares, services, and business of a hatchery.
55. Also, it is submitted that the Complainant has failed to provide evidence to support its argument that the Registrant has no legitimate interest in the domain name.
56. The Registrant makes a further argument as to why it has a legitimate interest in the domain name. That argument will be elaborated on in due course but its substance is that the Registrant runs a legitimate and established business, that it has a corporate name and that the disputed domain name legitimately reflects that name.

C. BAD FAITH

57. The Registrant submits that it has never acted in bad faith.
58. The Registrant rejects the Complainant's argument that it acted in bad faith pursuant to paragraphs 3.5.3 and 3.5.4 as the Registrant has never committed bad faith under either paragraph.
59. On the evidence, there is no confusion, as the Registrant is well known in the industry and has made considerable promotional efforts to ensure this. It operates consistently under the name "Sunrise," and has done so since it first began operating in 2004.
60. Common sense, and the overwhelming evidence supporting the Registrant's position, show it registered its domain in good faith to promote its business under the name "Sunrise," which it uses consistently throughout its business dealings.
61. The Registrant therefore asks that the Panel dismiss the Complainant's claim, and that the Registrant be permitted to keep its Domain name.
62. The Registrant also requests that an order be made that the Complainant pay it \$5000 towards its costs in view of the Complainant's own bad faith in the conduct of this proceeding.
63. The Registrant also relies on several prior CIRA decisions in support of its position.

V - ADDITIONAL SUBMISSIONS - THE COMPLAINANT

A. REPLY TO RESPONSE

64. On 1 November, 2019, the Complainant submitted a Reply to Response in which it made the following contentions.
65. The fact is that the Complainant used the name "Lethbridge Hatchery" in Alberta because its former legal name was "Fraser Valley Chick Salcs Ltd." The reference to "Fraser Valley" had little relevance in Alberta, and accordingly the Complainant conducted business in Alberta as "Lethbridge Hatchery".

66. The choice of name had no connection with Mr. Keshwani, or any alleged agreement with him.
67. Since 1983, the Complainant has been operating in Canada under the trade-name SUNRISE, and has used a family of Sunrise Trade-marks as described in the Complaint. Moreover, "Hatchery" and "Poultry" are not discrete areas of the industry as alleged. The alleged distinction made by the Respondent is artificial and not supported by any evidence. Hatcheries are intimately connected and related to the poultry production system, and are considered to be part of the same industry.
68. Further, even the Registrant in its Response uses the terms "hatchery", "poultry" and "chicken" interchangeably in reference to the industry the Registrant and the Complainant operate in.
69. Most hatcheries in the industry are owned by poultry processors. The Complainant has expended substantial investment and resources to develop its reputation as a quality poultry processor which is threatened by the illegitimate use of the Domain and associated email address by the Registrant and Mr. Keshwani.
70. Miller Thomson LLP has previously represented "Alberta Hatching Egg Producers entity" and not the Registrant. Current counsel for the Complainant does not, and has not, represented either Alberta Hatching Egg Producers or the Registrant.
71. The Complaint is aimed at the use of the domain name "www.sunrisehatchery.ca" (the "Domain") by the Registrant, including the email address associated with the Domain, and not at the corporate registration of the corporation Sunrise Hatchery Inc.
72. It is the use of the Domain name that attracts this Complaint, and such use is illegitimate because it is used in a confusingly similar manner and contrary to the lawful common law and registered trademark rights of the Complainant under the Sunrise Trade-marks.
73. The Registrant minimizes the incidents of actual confusion that have occurred. However, it is not only the quantity of the incidents that is relevant, but also the nature and impact of the confusion. The association of the salmonella outbreak with the Complainant was a result of the improper and illegitimate use of the Complainant's trademark rights and the Domain by the Registrant and Mr. Keshwani. These incidents were widely reported in the media, and also resulted in Loblaw's, Inc. threatening to terminate its multi-million dollars sales relationship with the Complainant.
74. The Domain comprises the singular form of the registered trademark and common law trademark "SUNRISE HATCHERIES" of the Complainant. Moreover, the singular form is generic and not distinctive.
75. As noted in the Complaint, the limited content on the Domain is strongly suggestive of a lack of intention to actually use the Domain for a legitimate activity or business.
76. We note that any "use" of the Domain, and associated email addresses, in a trademark sense would, of course, be unlawful in light of the Complainant's rights to its common law and registered trademarks.

B. The Issue of Costs

77. On the issue of costs, even if the Registrant is successful, there is no basis for a finding of bad faith by the Complainant, or an award of costs against the Complainant. The Complainant's rationale for filing the Complaint includes legitimate concerns about its reputation, safety and trademark rights arising from the illegitimate use of the Domain by the Registrant. The Complainant has demonstrated that it has the colour of right to assert and defend its legitimate trademarks rights and reputation.
78. The authorities are clear that the Registrant bears the "difficult burden of proving the absence of colour of right or that the complaint is unfair".
79. An award of costs against the Complainant is only made where the complainant is not reasonably able to claim any colour of right to a trademark sufficiently related to the disputed domain.
- (a) *Ebates Canada Inc. v. Cranhill & Co.*, 2012 CarswellNat 1498 at para. 21.
- (b) *Visionary Motorsports Ltd. v. MC Motorsports Canada Ltd.*, 2013 CarswellNat 2046, at para. 52.
- (c) *Vancouver Community College v. Eminata Group*, 2020 CarswellNat 1260, at para.47.
80. The specific grounds in support of the bad faith allegations by the Registrant simply do not exist, i.e. that there is an agreement between the parties as alleged or at all. The "evidence" submitted by the Registrant is woefully lacking, and does not evidence any agreement between the parties. The alleged "evidence" in Schedule 2 of the Response merely comprises documents titled "Lethbridge Hatchery opening hours", "DIRECTORY AND LISTINGS ALBERTA", and a "List of Heath Monitored Hatcheries." None of these documents evidence any agreement by the Complainant.
81. Further, the Complainant has sufficiently demonstrated that it has valid trademark rights to a family of trademarks, collectively referred to as "Sunrise Trademarks" in paragraph 18 of the Complaint, including common law and registered trademark rights to the trademark "SUNRISE HATCHERIES", which is confusingly similar to the Domain.
82. A registered trademark is deemed to be distinctive and deemed to be valid at law.

C. THE REGISTERED TRADEMARK "SUNRISE HATCHERIES" IS NOT GENERIC.

D. Disposition Sought by Complainant

83. Accordingly, the Complainant submitted that it is entitled to the relief claimed in its Complaint, and that it should be awarded the maximum amount of \$5,000 in costs for illegitimate use of the Domain by the Registrant.

E. The Registrant

84. As the Panel did not request further evidence from either of the Parties, no further evidence was submitted.

VI - DISCUSSION OF THE ISSUES

A. CANADIAN PRESENCE REQUIREMENTS

85. Paragraph 1.4 of the Policy provides that a complainant initiating a complaint must satisfy the Canadian Presence Requirements for Registrants Policy in respect of the Domain Name that is the subject of the proceeding.

86. Paragraph 2 (d) of the Requirements relied on by Complainant, Version 1.3, provides that one of the entities that qualifies to apply to CIRA for the registration of, and to hold and maintain the registration of, a .ca domain name is (a):

“**Corporation.** A corporation under the laws of Canada or any province or territory of Canada.”

87. The Complainant is a corporation incorporated in British Columbia, Canada and it therefore meets the Canadian Presence Requirement under paragraph 2(d) of the CIRA Canadian Presence Requirements for Registrants Policy, Version 1.3.

88. The Complainant has therefore satisfied CIRA's Canadian Presence Requirement for Registrants Policy in respect of the disputed domain name.

89. The Panel so finds.

B. REGISTRATION OF THE DISPUTED DOMAIN NAME

90. The disputed domain name <sunrisehatchery.ca> was registered by the Registrant on November 20, 2007.

91. In support thereof, Complainant adduced a copy of the WHOIS information for the domain name which is attached to the Complaint at Schedule 6. The Registrar of the Disputed Domain Names is Webnames.ca Inc. and the Complainant has adduced evidence to that effect.

92. The Panel will therefore proceed with this matter on the basis that the Complainant has made out its standing to file the Complaint and that the Registrant is the proper party against whom the proceeding should be brought.

VII - DISCUSSION OF THE ISSUES - GENERAL

93. The purpose of the Policy, as stated in paragraph 1.1, is to provide a forum in which cases of bad faith registration of “.ca” domain names can be dealt with relatively inexpensively and quickly.

94. In accordance with paragraph 4.1 of the Policy, to succeed in the Proceeding, the Complainant must prove, on the balance of probabilities, that:

- (a) the Registrant's dot-ca domain name is "Confusingly Similar" to a Mark in which the Complainant had Rights prior to the date of registration of the domain name and continues to have such Rights; and
- (b) the Registrant has registered the domain name in bad faith as described in paragraph 3.5 or generally;

and the Complainant must provide some evidence that:

- (c) the Registrant has no legitimate interest in the domain name as described in paragraph 3.4.

95. The Panel will now deal with each of the three elements.

B. CONFUSINGLY SIMILAR

96. As the Complainant correctly submits, it is required to prove that the disputed domain name is confusingly similar to a Mark in which the Complainant had rights prior to the date of registration of the domain name, November 20, 2007, and continues to have such rights. The Complainant must therefore show that it has rights to a mark, that it had those rights before the domain name was registered, that it still has them and that the domain name is confusingly similar to the mark on which it relies to establish that proposition. The Complainant submits that it can meet those requirements.

C. THE MARK

97. The first question that arises is whether the Complainant has a trademark on which it can rely for the purpose of this proceeding. The Complainant has adduced evidence to show that it is the owner of a series of trademarks that include the word SUNRISE. Those trademarks are set out in detail earlier in this decision and it is not necessary to repeat them here.

98. The Panel also considers that before proceeding it is appropriate to make the following further remarks about the Complainant's trademarks.

99. From time to time there has been discussion about the evidence showing that the Registrant was carrying on business under the name "Sunrise Hatchery" since 2004. In that regard it is interesting to note that in its trademark application for SUNRISE HATCHERIES, the Complainant under the heading "claims" asserted "used in Canada since at least as early as October 2016." The Complainant has a number of trademarks using the word "Sunrise" in relation to its sale of poultry food products, but this can give it no right to claim an interest or deny the Registrant an interest in Sunrise Hatcheries or Sunrise Hatchery prior to starting to use that name "as early as October 2016". It appears that "hatchery" or "hatcheries" denotes a different part of the business than that claimed by the Complainant in its trademark applications for the other trademarks prior to registering SUNRISE HATCHERIES in 2018. The Registrant has been using the name Sunrise Hatchery since 2004 and registered the domain name in 2007, approximately nine years before the Complainant says it started to use the name Sunrise Hatcheries.

100. It should, however, be noted that as with the analogous Uniform Domain Name Dispute Resolution Policy, the Complainant is only obliged to rely on "a mark", that is to say one mark and not several marks.
101. It is understandable, therefore, that the Complainant should hone in on its submission that the disputed domain name is confusingly similar to its trademark for SUNRISE HATCHERIES, as, *prima facie*, that is the trademark with which the disputed domain name appears to have the most affinity. Indeed, a lot of the Complainant's argument in this section of its Complaint is based on the argument that when internet users see the word "sunrise" and "hatcheries", they would naturally think that the domain name <sunrisehatchery.ca> invokes the chicken hatcheries of the Complainant.
102. The Panel also agrees with the Complainant's submissions that useful tests of confusing similarity are to be found in section 3.3 of the Policy, that there are circumstances specified in section 6(5) of the *Trademarks Act* that should be taken into account, that the decision in *Ford Motor Company of Canada Ltd v. Antonia Ojo*, CIRA case No. DCA-1790 provides useful guidance on interpretation and that, after all, the domain name does carry the word SUNRISE, which is in almost all of the trademarks relied and used by the Complainant. Moreover, the only difference between the domain name and the SUNRISE HATCHERIES trademark is that the domain name is in the singular form of "hatchery" and the trademark is in the plural form of HATCHERIES. However, the objective internet user is unlikely to regard that as a difference of any substance.
103. On the surface, therefore, the SUNRISE HATCHERIES trademark is a prime candidate for the Complainant to rely on to seek to show that the domain name is confusingly similar to a trademark.
104. All of the foregoing are points that might be seen to be favourable to the Complainant on this issue and they probably would be so if it were not for one other important issue.
105. That qualification is that the Complainant has insurmountable problems in relying on the SUNRISE HATCHERIES trademark to show that the domain name is confusingly similar to a trademark on which it can rely. It can rely on the SUNRISE HATCHERIES trademark, but it also has to show that it had rights in that trademark at the time the domain name was registered, which was on November 20, 2007.
106. The Complainant acquired its rights to the SUNRISE HATCHERIES trademark on August 21, 2018, which was 11 years after the domain name was registered. Even if the date of filing the application were the pivotal date, which was February 2, 2017, this occurred many years after the domain name was registered.
107. Accordingly, although the Panel has no difficulty in finding that the disputed domain name is confusingly similar to the SUNRISE HATCHERIES trademark, and it so finds, it must also find on the evidence that the Registrant had registered the domain name well before the Complainant acquired its rights to the trademark in question.
108. Accordingly, the trademark does not satisfy the clearly stated requirement that the Complainant must have had its rights in the trademark by the time the domain name was registered, i.e. by November 20, 2007, which it cannot do.

109. The question then arises whether the Complainant may rely on others of its SUNRISE trademarks to satisfy this element. Those trademarks are the trademarks listed above for SUNRISE POULTRY, SELECT SERVINGS, SUNRISE FARMS, SUNRISE FARMS SELECT SERVINGS, and SUNRISE FARMS. The Complainant's argument goes beyond the sole trademark SUNRISE HATCHERIES and at one point in the Complaint it makes the point that the word SUNRISE is "(t)he distinctive element of *all the registered Sunrise Trademarks...*". The Complainant may therefore be making an argument that the disputed domain name is confusingly similar to all of the SUNRISE trademarks relied on. It is therefore relevant to look at each of those trademarks to see if they assist the Complainant in establishing this element.
110. This is an important issue as, if the Complainant does not succeed on it, it will lose the entire proceeding, as it must prove all three constituent elements.
111. The problem for the Complainant in relying on these trademarks is that they bring to the equation other concepts than those clearly invoked by the SUNRISE HATCHERIES trademarks. The trademarks in question concern farms (possibly farms of any sort not even concerned with poultry or chickens), poultry (which of course has a broader meaning than chickens), select servings and farms select servings (which may relate to any other farming activity, even those unrelated to chicken or poultry).
112. When the "sunrisehatchery.ca" domain name is compared with any of those activities, the objective bystander may well think that they do not have anything to do with chicken hatcheries and that therefore they, the internet users, are not confused and do not even find the concepts similar to those of a chicken hatchery.
113. Nevertheless, it is conceivable that some internet users may form the view that the domain name is similar to the trademarks and the activities for which it is well known and that they are therefore confused as to whether it is invoking the activities covered by the trademarks and the brand that they know as the brand of the Complainant.
114. It should also be taken into account here that it is often said that complainants have to surmount a comparatively low threshold to meet the current element, which is a threshold to give them standing to proceed with the claim.
115. Bearing those factors in mind, the Panel is prepared to give the benefit of the doubt to the Complainant on this comparatively formal issue and find that the disputed domain name is confusingly similar to the other trademarks referred to above, that is the SUNRISE POULTRY, SELECT SERVINGS, SUNRISE FARMS, SUNRISE FARMS SELECT SERVINGS and SUNRISE FARMS trademarks.
116. It will be noted that the Complainant had acquired its rights in all those trademarks by the time the disputed domain name was registered, i.e. by November 20, 2007. They would therefore qualify as trademarks in which the Complainant had its rights by the time the domain name was registered.
117. The same must be said with respect to the additional argument being advanced that the disputed domain name is confusingly similar to a common law or unregistered trademark. "Sunrise" has in one form or another been used by the Complainant in its

business for some years, although the Complainant's case has not been established by any the evidence usually adduced in such cases, such as public recognition of the name as the source of goods and services, sales under that name, advertising, unsolicited recognition in trade journals and the media and such like and other evidence to that effect. These tests are well known but have not been applied in the present case with any strength by the Complainant.

118. The Complainant asserts on many occasions and assumes on others that it has a common law trademark. As such it does not really engage with the basic proposition in the Policy, which is that, as is clearly stated in paragraph 4.1 of the Policy that the Complainant "must prove" its allegations, not assert them in conclusory statements that cannot be tested by the other side.
119. Nor is it made clear in the Complaint just what the common law trademark is said to be and when it is said to have commenced, an issue likely to be pivotal in the present case.
120. Nevertheless, it is probable that some internet users would see the SUNRISE designation as a statement of the source of the Complainant's goods and therefore as a common law trademark and, indeed, pivotal in the present case. They may then conclude that the domain name is invoking the same products or the same general business interests as those known to be covered by the trademark.
121. Accordingly, the Panel will also make a finding that the Complainant has established the common law trademark for which it has contended.
122. The Panel therefore concludes on this issue that the Complainant has shown that the disputed domain name is confusingly similar to the following of the Complainant's trademarks:
 - (a) SUNRISE POULTRY, Registration No. TMA 323,193 registered with the Canadian Intellectual Property Office on January 30, 1987;
 - (b) SELECT SERVINGS, Registration No. TMA 405, 550 registered with the Canadian Intellectual Property Office on November 27, 1992;
 - (c) SUNRISE FARMS, Registration No. TMA 661,473 registered with the Canadian Intellectual Property Office on March 24, 2006;
 - (d) SUNRISE FARMS SELECT SERVINGS, Registration No. TMA 693,473 registered with the Canadian Intellectual Property Office on August 3, 2007;
 - (e) SUNRISE FARMS Registration No. TMA 693,474 registered with the Canadian Intellectual Property Office on August 3, 2007.
123. The Complainant had acquired its rights in each of those trademarks by the time the domain name was registered, i.e. by November 20, 2007 and it appears to have those rights today. The Panel therefore finds that the Complainant continues to have such rights.
124. The Panel makes the same finding with respect to the common law trademark for SUNRISE when used as a trademark by the Complainant in its business activities and

also finds that the Complainant acquired its rights in the common law trademark prior to November 20, 2007, when the disputed domain name was registered.

125. Each trademark therefore qualifies as a trademark the Complainant may rely on to establish the first element under the Policy.
126. But they naturally cannot determine the outcome of the other and more substantial issues of legitimate interest and bad faith which will be dealt with in due course. At the present they merely satisfy the standing requirement that the Complainant must make out to continue with the proceeding at all.
127. The Complainant has therefore established the first of the three elements that it must show in this proceeding.
128. The Panel will now turn to the second element.

D. DOES THE REGISTRANT HAVE A LEGITIMATE INTEREST IN THE DOMAIN NAME?

129. The Complainant submitted that the Registrant cannot bring itself within any of the criteria in paragraph 3.4 of the Policy which, if made out, will give rise to a legitimate interest in the domain name.

E. IN ITS TURN, THE REGISTRANT SAYS THAT IT CAN BRING ITSELF WITHIN SEVERAL OF THOSE CRITERIA.

130. In particular, the Registrant relies on paragraph 3.4.2 of the Policy. That paragraph provides in effect that a legitimate interest will be shown if the Registrant registered the domain name in good faith in association with any wares, services or business and the domain name was clearly descriptive of "...(i) the character or quality of the wares, services or business; (ii) the conditions of, or the persons employed in, production of the wares, performance of the services or operation of the business; or (iii) the place of origin of the wares , services or business."
131. Two questions arise in determining whether that paragraph is applicable to the Registrant. The first is whether the Registrant registered the domain name in good faith. That is one of the questions that it may be difficult for a panel to decide, as panels do not have access to the forensic tools available to courts in a civil trial.

F. Did the Registrant register the domain name in good faith?

132. On the available evidence the Panel in the present case is not able to conclude that the Registrant was actuated by anything other than good faith in registering the domain name.
133. The chronology of events referred to above and, so far as the Panel knows, the entire factual framework, is consistent with the Registrant acting in good faith in registering the domain name and inconsistent with its registering the domain name in bad faith. Until that point, November 20, 2007, no one other than the Registrant had used the expression Sunrise Hatcheries. The Registrant had used it when registering Sunrise Hatchery Inc. on 6 February 2004 and again on November 20, 2007 when it

registered the domain name itself, so it could hardly have been copying or plagiarising the Sunrise Hatchery name.

134. As it is put in paragraph 5 of the Reply to the Response, the argument of the Complainant seems to be that the domain name is a copy of the Complainant's "registered trademark and common law trademark "SUNRISE HATCHERIES" ...". But that cannot be so; the domain name was registered by the Registrant on 20 November 2007, long before the Complainant had its trademark for SUNRISE HATCHERIES registered, which was not until 21 August 2018.
135. The Panel therefore finds for all of those reasons that, on the evidence, the Registrant registered the domain name in good faith.

G. Is the domain name descriptive?

136. The second question arises is whether the domain name is descriptive of "wares, services or business". The Registrant quite specifically maintains that it is descriptive of a recognized hatchery, a view that is supported by the use of the word "hatchery" in the domain name. The Complainant has not replied or sought to rebut this view in its Reply to Response and, again, the Panel has little choice but to reach its own conclusion on the limited submissions and virtually no evidence.
137. In those circumstances, the Panel finds that the domain name is descriptive of a hatchery which must generally be understood in the industry and in the light of the little that is known of the parties' activities, as invoking the notion of a chicken hatchery. The fact that the dominant reference in the domain name, namely "hatchery" is qualified by the use of the adjective "sunrise" does not detract from the obvious point that the purpose of the domain name is to describe a hatchery.
138. The Panel therefore finds that the Registrant has brought itself within the provisions of paragraph 3.4.2 and has therefore established that it has a legitimate interest in the domain name.
139. Further, the Panel finds that no case or sufficiently strong case has been made out, on the evidence, against the Registrant's propositions so as to deprive it in a summary procedure of a domain name registered 12 years ago and maintained since then without any apparent challenge or objection or at least without any of which evidence has been adduced.
140. The Registrant has a further ground for its submission that it has a legitimate interest in the domain name. On one view, this ground is more significant than the argument based on paragraph 3.4.2, as it goes to the history of the Registrant's business that it says it conducts under the domain name.
141. Under this heading, the Complainant commenced the debate by arguing in the Complaint that the Registrant has no legitimacy in the domain name because there is no intention to use the domain name for "a legitimate activity or business."
142. Moreover, although the Complainant concedes that the Registrant actually incorporated a company, namely Sunrise Hatchery Inc. as an Alberta company, the

Registrant does not, according to the Complainant, use the corporate name to conduct a legitimate business.

143. Not only is that so, the Complainant argues, but the Registrant uses a different business name, namely Rochester Hatchery.
144. The Registrant denies these allegations and say that it runs a legitimate business using the name "Sunrise" and that it has done so since it first began operations in 2004. Indeed, it maintains that the family interests behind the Registrant have three companies, one of which is Sunrise Hatchery Inc. and that it began operations in 2004. At that time, it says, the Complainant had no trademarks registered, presumably for SUNRISE HATCHERIES. It should also be noted here that the Registrant incorporated the company Sunrise Hatchery Inc. on February 6, 2004 which was before it registered the domain name, on 20 November 2007.
145. The Registrant therefore roundly rejects the argument of the Complainant that the
146. Registrant "does not rely on this corporate name to conduct any legitimate business."
147. The Registrant amplifies its argument and says that the allegation that it does not rely on the name Sunrise Hatchery to conduct a legitimate business is false and that the Complainant and its counsel know that it is false.

H. Evidence adduced by the Registrant to show its use of the name Sunrise Hatchery

148. The Registrant has to its credit adduced evidence to support its position and has tendered documentary evidence designed to show that the corporate name and the name Sunrise Hatchery are in fact used by the Registrant in business. It is not necessary to set this evidence out in detail and, again, it must be said that the Panel is not a court of law engaged on an assessment of evidence. Suffice to say that in substance the evidence consists of corporate tax returns under the corporate name, a federal government-issued permit to operate under the name "Sunrise Hatchery", sponsoring yearly advertisements for "Sunrise Hatchery" in poultry magazines, attending the Alberta Poultry Industry Conference, which the Registrant regularly sponsored under the name "Sunrise Hatchery," hosting its own annual convention to promote its business under the name "Sunrise Hatchery," sending customers promotional materials with the name "Sunrise Hatchery," and using the name "Sunrise Hatchery" on business cards.
149. The Registrant argues that these documents show the Registrant is a legitimate, profitable business which has used its name in connection with its Alberta hatchery operations for the past fifteen years.
150. There may be argument about the extent and effect of this evidence, but the fact is that it exists. It is evidence and the Panel has examined it in some detail. Having done so, the Panel holds the view that the evidence justifies the conclusion of the Registrant that its business under the name Sunrise Hatchery is "a legitimate, profitable business which has used its name in connection with its Alberta hatchery operations for the past fifteen years."

151. The Panel's conclusion on this evidence is that it is overwhelming and shows that the Registrant was known and apparently still is, as Sunrise Hatchery and has conducted one of its businesses under that name. The Complainant also seems to have known of that fact, and must have known that the allegation that the Registrant does not rely on the corporate name is false. The tax returns are under the corporate name, the Federal permit, the advertisements, the sponsorship, the convention, the promotional materials and the business cards all seem to support the Respondent's position by referencing the corporate name and are consistent with a business run under the domain name, as the Registrant has alleged .
152. The Panel adds to this analysis the following. During the proceeding it emerged that Messrs Miller Thomson acted for "Alberta Hatching Egg Producers", evidently an unincorporated entity, and thereby for both Sunrise Hatchery (the Registrant) and Lethbridge Hatchery (c/o Sunrise Farms) (the Complainant).The Panel will not make any comment on that relationship other than to say that as a matter of evidence, the Complainant must have known in 2013, that the Registrant was in fact operating in Alberta as Sunrise Hatchery, as alleged by the Registrant.
153. Moreover, it must also follow that when the Complainant registered its trademark for SUNRISE HATCHERIES on 21 August 2018 it must have known that the Registrant had been operating its hatchery for some years and under the name "Sunrise Hatchery".
154. Thus, when the Registrant registered its domain name on 20 November 2007 it was adopting its business name as a domain name, which attracts the benefit of paragraph 3.4.5 and gives the Registrant an additional ground of legitimacy and hence a legitimate interest in the domain name.
155. Indeed, it is difficult to see how the opposite could be contended.
156. However, the Panel will content itself by saying that on the evidence presented, it shows that the Complainant's argument that the domain name and the corresponding corporate name are not used for a legitimate business purpose is singularly unpersuasive.
157. The Panel therefore finds on the evidence presented to it that the Registrant has a legitimate interest in the disputed domain name.
158. The Complainant has thus failed to make out the second of three elements that it must make out to succeed in this proceeding.

I. REGISTRATION IN BAD FAITH

159. The Panel now turns to consider whether the disputed domain name was registered in bad faith. In that regard, the Panel notes that, consistent with the decision in *Canadian Broadcasting Corporation? Societes Radio-Vanada v. William Quon*, CIRA Dispute Number 00006(April 8, 2003), pp.13-14, surrounding circumstances may be considered in assessing whether the disputed Domain Name has been registered in bad faith.
160. By clause 3.1 of the Policy, the Complainant is obliged to prove that:

“(c) the Registrant has registered the domain name in bad faith as described in paragraph 3.5.”

161. Section 3.5 provides that “(f) or the purposes of paragraphs 3.1(c) ... any of the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence that a Registrant has registered a domain name in bad faith:...” and then goes on to provide four such circumstances, two of which are relied on by the Complainant, namely:

“(a)...;

(b)

- (c) the Registrant registered the domain name or acquired the Registration primarily for the purpose of disrupting the business of the Complainant, or the Complainant’s licensor or licensee of the Mark, who is a competitor of the Registrant; or
- (d) the Registrant has intentionally attempted to attract, for commercial gain, Internet users to the Registrant’s website or other on-line location, by creating a likelihood of confusion with the Complainant’s Mark as to the source, sponsorship, affiliation, or endorsement of the Registrant’s website or location or of a product or service on the Registrant’s website or location.”

162. It is to be noted that the criteria for bad faith are not exclusive, but that complainants may rely on circumstances other than those enumerated to show bad faith registration, but the Complainant relies on no additional circumstances.

163. The Panel will now examine the two criteria relied on by the Complainant.

(a) The Complainant’s case on bad faith generally

164. The Panel finds on the evidence that the Complainant’s case on bad faith has not been made out on either criterion, or at all.

165. Here again, the Panel must remind the parties and all others who come to use the CIRA Policy that its basis is contained in two words in paragraph 4.1 of the Policy under the heading “Onus.” The two words are that the Complainant “must prove” the allegations it makes against the Registrant. This the Complainant has not done, but rather has made a series of conclusory assertions that are of no value and supported by no evidence.

166. The two specific grounds relied by the Complainant are as follows

3.5.3 Disrupting the business of the Complainant, being a competitor of the Registrant;

167. The Complainant alleges that the Registrant, being a competitor of the Complainant set about disrupting its business. This it did by using the name Sunrise Hatchery which “could” have the following result, expressed in this way, that it “**could cause confusion and negatively impact public image impact about affiliation with the Complaint (sic)**”. Presumably the Complainant means affiliation with the Complainant, not the Complaint.

168. That analysis is speculative, based as it is on conjecture of a result that could occur and, equally, not occur. Leaving that aside, the sole event relied on by the Complainant is an outbreak of salmonella in 2015. To suggest this is evidence of the Registrant's intention to register the domain name in 2007 to disrupt the business of the Complainant is illogical. More importantly, it is nowhere near the type or quantity of evidence to found so serious a charge against the Registrant of wanting to disrupt the Complainant's business. The whole incident seems to have been blown out of proportion, the Complainant seems to have, on the evidence, have done nothing about it since 2015 and it does not show bad faith on the part of the Registrant or anyone else, it being based on a public health issue endemic to the chicken industry.
169. The Panel therefore rejects it as a ground of bad faith.
170. The Panel also rejects, on the evidence presented by the Complainant, the Complainant's conclusion that it is evident that the Registrant is a competitor of the Complainant, and is attempting to disrupt its business by causing confusion. Of course, the Registrant is a competitor of the Complainant, and it can be assumed it is engaging in competition, but there is no evidence whatsoever that the Registrant is attempting to cause any such disruption or cause confusion.

3.5.4 Intentionally Attract Traffic for Commercial Gain by Creating likelihood of Confusion;

171. The Complainant also relies on paragraph 3.5(d) of the Policy and submits that the Registrant intentionally attempted to attract, for commercial gain, internet users to its website by creating a likelihood of confusion with the Complainant's SUNRISE trademarks.
172. The Complainant's main complaint under his heading is that the Registrant is competing for internet traffic and that it could only have chosen the name "sunrise hatchery" for its domain name to disrupt the Complainant's business.
173. From this it is alleged that a new concept has arisen, that of to "compete illegitimately".
174. The difficulty in presenting this type of argument is that it is completely devoid of evidence of any improper conduct. The Registrant presumably competes as best it can, but there is no evidence of anything it has done in the course of its competition that is untoward.
175. Indeed, none of the usual and very serious evidence normally presented in such cases has been presented in the present case. There is no evidence of passing off, plagiarising a website, spelling alterations made to names of products, deceitful conduct or advertising, counterfeit products or conduct of that sort. The Complainant's real complaint seems to the Panel to be that the Registrant is in competition with it, but that does not show bad faith.
176. The Complainant also repeats the argument that the Registrant is not known in the industry and does not ply its trade under that name. Both such contentions have already been shown to be devoid of evidence to support them and that conclusion is repeated here.

177. As to the allegation that the domain name "may" decrease site visits to the Complainant's website, the allegation is so speculative as to be of no evidentiary value, as well as not being supported by any evidence at all.
178. The Panel therefore finds on the evidence that the case for bad faith has not been made out and that the Complainant has not met its evidentiary burden in that regard.
179. The Complainant has therefore not established the third of the three elements that it must establish.

VIII - CONCLUSION AND DECISION

180. The Panel finds that Complainant has not proven, on the balance of probabilities the second and third elements of the Policy and that the Complainant is not entitled to the relief it seeks.
181. As a result, the disputed domain name will remain with the Registrant Sunrise Hatchery Inc.

IX - ORDER

The Complaint is hereby dismissed.

X - CLAIMS FOR COSTS

182. In the Response, the Registrant seeks an order for "the maximum \$5,000 in costs" under sub-paragraph 4.6 of the Policy.
183. In the Reply to the Response, the Complainant seeks "the maximum amount of \$5,000 in costs for illegitimate use of the Domain by the Registrant".

A. Applicable Provisions of the Policy on Costs

184. Under paragraph 4.6, costs may be claimed if the Registrant is successful and the Registrant proves, on a balance of probabilities, that the Complaint was commenced by the Complainant for the purpose of attempting, unfairly and without colour of right, to cancel or obtain a transfer of any Registration which is the subject of the Proceeding.
185. There is no provision in the Policy for an award of costs if the Complainant is successful, nor is there any jurisdiction to make such an award.
186. Accordingly, only the Registrant's claim for costs will be considered further, the Complainant's claim for costs is utterly without merit.

B. Submissions of the Registrant on Costs

187. The Registrant's submission is framed narrowly. It submits that in this case, the Complainant acted in bad faith because it omitted details of its dealings with the Registrant. Specifically, the Complainant failed to reference the agreement between the parties that the Complainant would operate in Alberta under the name "Lethbridge

Hatchery" — an agreement which counsel for the Complainant is well-aware of.
[Schedule 2]

188. Because the Complainant omitted to mention previous dealings, and because its submissions are said to be without foundation, the Registrant asks the Panel to award the maximum \$5,000 in costs, to help defray the Registrant's legal expenses in responding to the Complaint.

C. Submissions of the Complainant on Costs

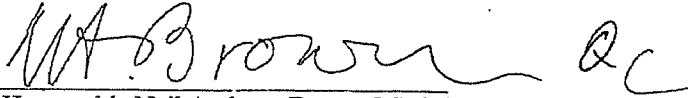
189. The Complainant submits that, even if the Registrant is successful, there is no basis for a finding of bad faith by the Complainant, or an award of costs against the Complainant.
190. On the alleged Lethbridge agreement, the Complainant denies that there is or was any agreement between the parties as alleged in the Response, or at all. The Complainant says that the rationale for filing the Complaint includes legitimate concerns about its reputation, safety and trademark rights arising from the illegitimate use of the Domain by the Registrant. Moreover, it says that the Complainant has demonstrated that it has the colour of right to assert and defend its legitimate trademarks rights and reputation.

D. DECISION ON CLAIM FOR COSTS

191. To be successful in its request for an order pursuant to paragraph 4.6 of the Policy, the Registrant must convince the Panel that the Complaint "was commenced by the Complainant for the purpose of attempting, unfairly and without colour of right, to cancel or obtain a transfer" of the Domain Name. Bad faith or misconduct in the course of the proceeding, even if made out, are not enough to sustain an award of costs under the Policy.
192. Here, nothing was said by the Registrant in seeking costs with respect to the Complainant acting "unfairly and without colour of right". That should result in the dismissal of the claim for costs.
193. Even if "bad faith" were enough, the Registrant says that bad faith relates to "omitted details" and specifically the failure of the Complainant to reference the agreement between the parties that the Complainant would operate in Alberta under the name "Lethbridge Hatchery". The Complainant says that the burden of proof rests of the Registrant in respect of the claim for costs and that "no evidence has been submitted by the Registrant to support this allegation of an agreement". In effect, the Registrant made a bare allegation with nothing more.
194. A bare allegation of non-disclosure said to constitute "bad faith" is not enough to establish that the Complainant acted "unfairly and without colour of right", especially where this Panel has found that the Complainant had standing and that the disputed domain name is confusingly similar to the Complainant's trademarks.
195. Therefore, this Panel declines to order the Complainant to pay any amount under paragraph 4.6 of the Policy.
196. A complainant must certify that "the information contained in this Complaint is to the best of the Complainant's knowledge complete and accurate". However, any remedy

for misinformation – for information which is not complete and accurate, lies elsewhere. This Panel may not award costs for a Complaint which is not complete and accurate.

Date: December 2, 2019



The Honourable Neil Anthony Brown QC, (Chair)



Thomas Manson, QC



W.A. Derry Millar

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